STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ANTHONY PAUL RODRIQUEZ,

Defendant-Appellant.

UNPUBLISHED
September 29, 2009

No. 286732
Grand Traverse Circuit Court
LC No. 08-010512-FC

Before: Murray, P.J., and Markey and Borrello, JJ.

PER CURIAM.

Defendant appeals as of right from his jury trial conviction of unarmed robbery, MCL 750.530, for which he was sentenced as a fourth habitual offender, MCL 769.12, to 19 to 40 years' imprisonment. We affirm.

The evidence established that defendant and the victim were backseat passengers in a car driven by a friend when defendant asked the driver to turn and proceed down an alley, where defendant forcibly took a large quantity of cash from the victim.

On appeal, defendant argues that he was denied the effective assistance of counsel, and that the trial court erred in scoring Offense Variables (OV) 8 and 14.

I. Ineffective Assistance of Counsel

A claim of ineffective assistance of counsel should be raised in the trial court by a motion for either a new trial or an evidentiary hearing. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002), citing *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973). Because defendant took neither action in this case, appellate review is limited to mistakes apparent on the existing record. See *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

"In reviewing a defendant's claim of ineffective assistance of counsel, the reviewing court is to determine (1) whether counsel's performance was objectively unreasonable and (2) whether the defendant was prejudiced by counsel's defective performance." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Regarding the latter, the defendant must show that the result of the proceeding was fundamentally unfair or unreliable, and that but for

counsel's poor performance the result would have been different. *People v Messenger*, 221 Mich App 171, 181; 561 NW2d 463 (1997).

Defendant asserts that his trial attorney failed to convey a plea offer to him in a timely manner, having mailed the offer to defendant's previous place of incarceration. The resulting delay, defendant argues, prevented him from being able to meaningfully consider the plea offer before trial. Defendant further points out that, in the early stages of trial, defense counsel indicated that a plea offer discussed that morning was "more favorable" than one defendant had rejected at the final conference, and argues that this shows he was prejudiced in the matter, having received a longer minimum sentence after trial than he would have received under the plea agreement. We find these arguments unpersuasive.

Failure of counsel to convey a plea offer may constitute ineffective assistance of counsel. *People v Williams*, 171 Mich App 234, 241; 429 NW2d 649 (1988). However, defendant cites no authority for the proposition that defense counsel's conveyance of a plea offer on the morning of the trial date constitutes deficient performance. Further, defendant in his brief on appeal suggests that he may in fact have received the plea offer as much as two days earlier.

The prosecuting attorney and trial court both showed a willingness to engage in plea negotiations on the morning of trial. The court asked defendant what he wanted to do, while the prosecuting attorney gave no indication the offer was withdrawn. It was defendant's own obstinacy in shaking his head and stating that his attorney could do "whatever he wants to do," not some action by defense counsel, that led the court to conclude that defendant was not interested in pursuing that option. Defendant's attempt to characterize his actions before the trial court as indicative of his frustration with counsel, rather than of his unwillingness to take seriously his opportunity to accept a plea bargain, is imaginative but not persuasive.

"[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland v Washington*, 466 US 668, 690; 104 S Ct 712; 169 L Ed 2d 675 (1984). In this case, the record suggests that defendant, at a minimum, received notice of the plea offer on the morning of trial, and that defense counsel tried in vain to discuss the matter with him. This does not bring to light performance so deficient as to be objectively unreasonable.

Further, even if defendant had shown that the plea offer had not been conveyed with sufficient time to allow him properly to consider it, the record does not support a finding that defendant was prejudiced by any such failure on defense counsel's part. To show prejudice, a defendant must prove by the preponderance of the evidence that he would have accepted the plea offer. See *Williams*, *supra* at 242. Defendant asserts that the offer at the final conference, which he rejected, was to plead guilty to unarmed robbery in exchange for the dropping of his habitual offender status, which would have reduced his minimum term of imprisonment from 228 months to 114 months. Then, just before trial, defendant refused to respond meaningfully to entreaties to consider a "more favorable" plea offer. Once trial was underway, defendant gave indications that he might like to accept the deal after all. Defendant argues that his delayed attempt to take advantage of the offer showed his willingness to accept it. However, in light of the evidence that defendant did not accept a plea offer at the final conference, which would have reduced his minimum sentence by half, and then showed no interest in engaging in meaningful plea

negotiations before trial, we can hardly conclude that defendant has shown he would have accepted the prosecutor's final offer before trial even if he had had more time to consider it.

That defendant may have felt some remorse at letting that opportunity slip away does not mean that his defense attorney was ineffective. "The ultimate decision to plead guilty is the defendant's, and a lawyer must abide by that decision." *People v Effinger*, 212 Mich App 67, 71; 536 NW2d 809 (1995). The prosecution has the right to withdraw any tentative plea offers absent performance by defendant or prejudicial reliance by defendant on that offer. *People v Heiler*, 79 Mich App 714, 719; 262 NW2d 890 (1977). Neither the Michigan Supreme Court nor the United States Supreme Court has recognized a right of parties to a criminal prosecution to engage in plea bargaining. *People v Payne*, __ Mich App ___; ___ NW2d ____ (Docket No. 280260, issued July 28, 2009), slip op p 5.

For the above reasons, defendant has failed to show that trial counsel's conduct fell below an objective standard of reasonableness, or that he was prejudiced by counsel's conduct. See *Rockey, supra* at 76. We accordingly reject this claim of error.

II. Offense Variables 8 and 14

Defendant argues that the sentencing court's scoring decisions for OV 8 and OV 14 were unsupported by the evidence. When reviewing a sentencing court's scoring decision, this Court determines whether the court properly exercised its discretion and if the record adequately supports a particular score. *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Facts relied on in scoring the sentencing guidelines need be proved by only a preponderance of the evidence. *People v Golba*, 273 Mich App 603, 614; 729 NW2d 916 (2007).

We conclude that the trial court did not err in scoring 15 points for OV 8, as the evidence showed that defendant caused the victim to be moved to a place or situation of greater danger, on the ground that he asked the driver to turn down an alley purely to facilitate his escape. MCL 777.38(1)(a).

As defendant concedes, this Court has held there is no requirement that the asportation itself be forceful or even against the victim's will. *People v Spanke*, 254 Mich App 642, 647; 658 NW2d 504 (2003). The only requirement is that the asportation not be incidental to committing the underlying offense. *Id.* Movement of a victim, even voluntarily, to an area where he or she is secreted from the observation of others has been deemed asportation to a place or situation of greater danger. *Id.*

According to the evidence in this case, defendant instructed the driver to turn down an alley, thus placing himself and the victim an area better secreted from the observation of others. The trial court's conclusion that this was done to place the victim in a more isolated area in which to rob him was thus sufficiently supported. The court had a reasonable basis for assessing 15 points for OV 8.

Defendant's final argument is that the trial court erred in scoring 10 points for OV 14, which indicated that he was a leader in a multiple-offender situation. MCL 777.44(1)(a). Defendant argues that the others in the car did not participate in the robbery, characterizing their

testimony as showing they did not think defendant would actually rob the victim. We hold that the trial court properly took a different view of the evidence.

The entire criminal transaction in which the sentencing offense occurred is to be considered when determining the offender's role for purposes of scoring OV 14, not just behavior during the actual offense. MCL 777.44(2)(a); *People v Sargent*, 481 Mich 346, 350; 750 NW2d 161 (2008). In this case, the others in the car hedged when testifying about the extent to which they expected defendant to rob the victim. But one, the husband of the driver, specifically testified that, immediately before they entered the car and began the drive, defendant "definitely said he was going to get the money" the victim was known to be carrying. There is thus evidence to suggest that the others in the car at least suspected that the offense was about to occur, and that they followed the direction of the defendant at least concerning driving directions. Although the other occupants of the car were not charged with a crime, there nonetheless is evidence to support the conclusion that they assisted or facilitated defendant in committing his crime. For these reasons, the trial court did not err in scoring ten points for OV 14. See *People v Elliot*, 215 Mich App 259, 260; 544 Nw2d 748 (1996) (a sentencing court's scoring decision will be upheld if there is any supporting evidence in the record).

Affirmed.

/s/ Christopher M. Murray
/s/ Jane E. Markey
/s/ Stephen L. Borrello